As stated before, recent text books favor the doctrine of the case under comment. Otherwise opinion seems evenly divided. The bailor at one time had no rights against third parties. However, the right of bringing trover, replevin and trespass against third parties for injury to his chattel in the hands of bailee have been gradually acquired and this case seems to be in line with the increasing rights of the bailee to sue.

UNREASONABLE DISCRIMINATION IN THE EXERCISE OF THE POLICE POWER.

It has generally been agreed by all the courts that it is much easier to perceive and realize the existence and the sources of the police power than to mark its limitations or prescribe limits to its exercise. *Commonwealth v. Alger,* 7 Cush. (Mass.) 85. It is always easier, says Chief Justice Waite, to determine whether a particular case comes within the general scope of the power than to give an abstract definition of the general scope of the power itself which will be in all respects accurate. *Stone v. Mississippi,* 101 U. S. 814.

But in the recent case of *People ex. rel. Duryea v. Wilber,* 90 N. E. 1140, the New York Court of Appeals did not find it easy to determine whether that particular case came within the scope of the police power, since the decision was only reached by the close vote of four to three justices that an amendment to the Greater New York Charter, requiring that all public dancing academies and schools where a charge is made for teaching dancing shall procure a license authorizing the business to be conducted at the place named, was unconstitutional. This case was one of considerable public interest as the statute in question had been framed and passed through the urgent efforts of the Committee on Amusement and Vacation Resources of Working Girls as a measure to mitigate the evils of the cheap dance hall. In addition to the requirement of a license at a cost of $50 per year, the law laid down various other rules governing the conduct of such dancing academies, but only the resorts where dancing was taught for a consideration had to secure the license.

This classification the majority of the justices held was wholly an arbitrary and unjust discrimination, since it was based on a

ground that was without reason, "for there is nothing in the fact of teaching as distinguished from dancing without a teacher that has any injurious effect upon or relation to the morals, health, or good order of the community." Nor was the act intended as a revenue measure as the fees were all to go for the payment of the inspectors' salaries. The three dissenting justices felt that the wisdom of such legislation was no concern of the courts, and since the law only required a discrimination based on the police power to rest on a plausible reason, and there were reasons advanced which would at least support an argument in this case, they held it a constitutional exercise of the police power as promoting the public safety, health, and decency.

As a general rule, laws to be valid as police regulations must be necessary to the health, morals, order or safety of the community and no law prohibiting that which is harmless in itself or commanding that to be done which does not tend to promote the health, safety, or welfare of society, will be sustained, since it would be an unauthorized exercise of the power. *Ex parte Whitewell,* 98 Cal. 73. While the police power confided to the legislature is very extensive and in its exercise a very wide discretion as to what is needful or proper for that purpose is necessarily given to it, so that any business, occupation, rights, franchises or privileges becoming obnoxious can be regulated for the public welfare even to suppression, still this power is not above the Constitution, but rather begins only where the Constitution ends. *New Orleans Water Works Co. v. St. Tammany Water Works Co.,* 14 Fed. 194; *Wright v. Hart,* 182 N. Y. 330.

As a general proposition it may be stated that it is in the province of the law making power to determine whether the exigencies exist calling into exercise the power, and the exercise of its discretion in this respect is not the subject of judicial review. What are the subjects of its exercise and reasonable regulations is clearly established to be a judicial question. *T. W. & W. R. W. Co. v. City of Jacksonville,* 67 Ill. 37. The determination of the legislature as to what is a proper exercise of the power is not final or conclusive, but is subject to the scrutiny of the courts and a statute to be upheld must have some relation to the ends sought by the police power and the liberties of the people and the rights of property must not be unnecessarily invaded. If it violates no express commands of the Constitution and tends in a

degree that is perceptible and clear towards the preservation of the lives, the health, the morals, or the welfare of the community, and is not passed ostensibly in favor of the promotion of some distinct and totally different purpose, it comes within the jurisdiction of the legislature and the courts will sustain it. *People v. Gillson,* 109 N. Y. 389; *Wright v. Hart, supra; Chicago B. & Q. R. Co. v. State,* 47 Neb. 549.

But the most frequent source of unconstitutionality is not in the subject sought to be regulated, but in the existence of arbitrary distinctions as in the principal case. The rule requiring equality of treatment and protection is that such acts shall operate in their requirements with substantial equality to all. It is not sufficient that a classification has been enacted under the police legislation of the State, but it must appear that it is based upon some reasonable ground which has a proper relation to the attempted classification and is not a mere arbitrary selection. *Russel on Police Power,* p. 74. But such equality is not denied where the law operates alike upon all persons and property similarly situated. *Wallston v. Nervin,* 128 U. S. 578. Accordingly the Supreme Court has held that a municipal ordinance prohibiting washing and ironing in public laundries and washhouses within defined territorial limits, from ten o'clock at night till six in the morning, was a proper police regulation. Class legislation, discriminating against some and favoring others, is prohibited; but legislation which is carrying out a public purpose and is limited in its application, if within the sphere of its operations it affects alike all persons similarly situated, is not unconstitutional. *Barbier v. Connolly,* 113 U. S. 27.

In the case of *People ex rel Farrington v. Mensching,* 187 N. Y. 8, decided in 1907, the Court held a statute unconstitutional which imposed a tax of two cents on each share of corporate stock of one hundred dollars of face value or fraction thereof. The tax was thus measured by the number of shares regardless of their actual value. All corporate shares were placed in one class, but all members of the class were not treated alike, the statute bearing heavily on some and lightly on others. The 1899 anti-department store law of Missouri was an interesting example of the application of the rule of the principal case. In that case a statute of Missouri provided that in cities of fifty thousand population, certain enumerated kinds of goods should

not be sold in the same building under a unit of management without paying a tax of from $300 to $800 fixed by the Board of Commissioners for each city and which was to be uniform only in the same city. This was held to create a purely arbitrary distinction and to be void. *State ex rel Wyatt v. Ashbrook,* 154 Mo. 375.

Statutes regulating the right to practice medicine or other professions but allowing the right to all who have the qualifications prescribed, do not deny equal protection. *People v. Phippen,* 70 Mich. 6; *State v. Green,* 112 Ind. 462. But if such a statute discriminates between persons engaged in the same profession or against citizens of other States, then equal protection is denied, as in *State v. Pennoyer,* 65 N. H. 113, where a statute was held unconstitutional which required one of two classes of physicians differing only in respect to the residence to be subject to the expense of obtaining a license from which the other party was exempt.

Where the act requiring any plumber before engaging in the business to take an examination and obtain a license, but permitted all members of a firm to pursue the business where one only had procured such a license and all the members of a corporation to pursue it where the manager only had procured such license, it was held that the act did not operate equally upon all of a class pursuing the calling under like circumstances and was invalid. *State v. Gardiner,* 58 Ohio St. 599. If a law is impartial on its face, yet is applied and is so administered as to operate a denial of equal justice, it may be declared unconstitutional. *Yick Wo. v. Hopkins,* 118 U. S. 373. But the possibility of maladministration is not sufficient ground. *Williams v. Mississippi.* 170 U. S. 213.

From the principles laid down and the illustrations given of their application, it would appear, however, that the New York Court of Appeals has properly applied the law in the principal case.

MALICIOUS INTERFERENCE WITH BUSINESS.

Although the Courts, both in England and in America, have very generally held the rule, since *Stevenson v. Newham* (1853), 13 C. B. 285, that bad motive by itself is no tort, and that an act